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COMMENTS

THE MAKING OF THE 1986 FLORIDA SAFETY BELT LAW: ISSUES AND INSIGHT

JOHN G. VAN LANINGHAM

THE BILL invited controversy. Whether Florida lawmakers thought to make seat belt use mandatory sparked impassioned debate in the Florida Legislature during the 1986 Regular Session. Opponents of the bill spoke emphatically in defense of personal freedom; supporters recited facts, study results, and statistics in a laborious effort to enlighten and persuade. In the end, public safety prevailed over private autonomy: the Florida Safety Belt Law (FSBL)¹ managed to arrive alive.

The Act contains five sections; this Comment focuses primarily on the first two.² Section one expands the scope of the child restraint law;³ section two creates the FSBL.⁴ After examining relevant existing law, the author focuses on the FSBL and the legislative process from which it emerged. There follows an extended analysis of the amended child restraint law. Finally, constitutional questions are examined.

I. BACKGROUND

Florida is not alone in requiring seat belt use. Twenty-six other jurisdictions have enacted similar statutes,⁵ and in many other

1. Ch. 86-49, 1986 Fla. Laws 174 (to be codified at FLA. STAT. § 316.614(1)-(10)).

2. The other three sections are self-explanatory. Section 3 specifies the penalty for violation of the FSBL—twenty dollars including court costs. *Id.* § 3, 1986 Fla. Laws at 174 (amending FLA. STAT. § 318.18 (1985), to be codified at FLA. STAT. § 318.18(9)). Section 4 provides that insurers must reflect any savings from increased seat belt usage in their automobile insurance rates. *Id.* § 4, 1986 Fla. Laws at 175 (to be codified at FLA. STAT. § 627.0635). Section 5 sets the effective date. *Id.* § 5, 1986 Fla. Laws at 176.

3. *Id.* § 1, 1986 Fla. Laws at 173 (amending FLA. STAT. § 316.613(1)-(4) (1985), to be codified at FLA. STAT. § 316.613(1)-(3)).

4. *Id.* § 2, 1986 Fla. Laws at 174 (to be codified at FLA. STAT. § 316.614 (1)-(10)).

5. Staff of Fla. S. Comm. on Com., SB 210 (1986) Staff Analysis 1 (rev. Apr. 17, 1986) (on file with committee), reported that "[a]s of March 31, 1986, 23 states and the District of Columbia, comprising approximately 59% of the [United States] population, had enacted legislation mandating the use of safety belts." According to *Come July 1 it's buckle up or break the law*, St. Petersburg Times, June 4, 1986, at A1, col. 3, Florida was the twenty-sixth state to pass such a law. This latter figure, reflecting the most recent acts in other states, was the one most frequently quoted to legislators. *E.g.*, Fla. S., tape recording of

countries buckling up has long been a legal duty.⁶ Florida's new law is not, however, the state's first attempt to promote seat belt use; in the years preceding passage of the FSBL, a child restraint act,⁷ an administrative rule,⁸ and a supreme court decision⁹ all addressed the seat belt issue.

A. *The Child Restraint Law*

A limited mandatory seat belt use law, the Florida child restraint law¹⁰ has been in effect since July 1, 1983. It requires that children through five years of age be secured by federally tested and approved child restraint devices.¹¹ For children under age four, the device must be a separate carrier; those four to five years of age may be restrained with either a separate carrier or a seat belt.¹² However, before the legislature assembled in 1986, this law was limited in its scope. It applied only to parents and legal guardians transporting their own children in vehicles registered in Florida.¹³ Thus, drivers were under no legal obligation to secure the children of others, and the child restraint law did not apply to tourists. In addition, no parent charged with a violation of the child restraint law could be convicted if, before his court or hearing appearance, he tendered proof of his acquisition of a required child restraint device.¹⁴ In the FSBL, the legislature dealt with these loopholes.¹⁵

B. *Rule 13B-3.12, Florida Administrative Code*

Early in 1984, Governor Bob Graham and the Cabinet directed the Department of General Services to promulgate rules requiring state employees to wear seat belts when using a motor vehicle on

proceedings (May 28, 1986) (on file with Secretary) [hereinafter cited as May 28 Senate Debate].

6. STAFF OF FLA. S. COMM. ON TRANSP., AN EVALUATION OF THE NEED FOR LEGISLATION REQUIRING THE WEARING OF SEAT BELTS 81-82 (Jan. 1985) (on file with committee) [hereinafter cited as SENATE STUDY]. In all, 30 jurisdictions around the world now have mandatory seat belt laws, including Britain, Canada, France, West Germany, Japan, and the Soviet Union. *Id.*

7. Ch. 82-58, 1982 Fla. Laws 147 (codified at FLA. STAT. § 316.613(1)-(4) (1985)).

8. FLA. ADMIN. CODE R. 13B-3.12 (1984).

9. Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447 (Fla. 1984).

10. Ch. 82-58, 1982 Fla. Laws 147 (codified at FLA. STAT. § 316.613 (1985)).

11. Ch. 86-49, § 1, 1986 Fla. Laws 173 (to be codified at FLA. STAT. § 316.613(1)(a)).

12. *Id.*

13. FLA. STAT. § 316.613(1)(a) (1985).

14. *Id.* § 316.613(2).

15. Ch. 86-49, § 1, 1986 Fla. Laws 173 (amending FLA. STAT. § 316.613(1)-(4) (1985), to be codified at FLA. STAT. § 316.613(1)-(3)).

state business.¹⁶ In August 1984, the Department adopted Rule 13B-3.12, requiring all persons seated in a vehicle being used on state business, whether privately owned or leased by the state, to use their seat belts.¹⁷ Failure to comply with the rule results in disciplinary action.¹⁸ The rule provides that when an unrestrained employee is injured in an accident, and failure to wear a safety belt contributed to his injuries, his workers' compensation benefits may be reduced according to section 440.09(4), Florida Statutes.¹⁹ That statute requires a twenty-five percent reduction in benefits if the injury was caused by the employee's willful refusal to use a safety device or observe a safety rule required by law.²⁰ For state employees, then, the new seat belt law complements this existing rule.

C. *The Seat Belt Defense: Pasakarnis*

In the interim between the Florida Cabinet resolution and the adoption of Rule 13B-3.2, the Florida Supreme Court took a major step toward encouraging seat belt use in *Insurance Co. of North America v. Pasakarnis*.²¹ The issue was whether Florida courts should consider seat belt nonuse as evidence bearing on comparative negligence or the mitigation of damages.²² Though a long line of Florida authority urged otherwise, the court held that evidence

16. Fla. Cabinet Resolution of Feb. 21, 1984 (unnumbered).

17. FLA. ADMIN. CODE R. 13B-3.12(1) (1984).

18. *Id.*

19. *Id.*

20. FLA. STAT. § 440.09(4) (1985). Few state employees will suffer a reduction in workers' compensation should they be injured while unbuckled. First, "this statute is an [employer/carrier's] partial affirmative defense to a claim for benefits." *McKenzie Tank Lines, Inc. v. McCauley*, 418 So. 2d 1177, 1180 (Fla. 1st DCA 1982) (citation omitted). To successfully employ this defense, the state would have to establish willful refusal to use a safety belt. Willful refusal means "'an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury, or the illegal act must be done with a wanton disregard of probable consequences.'" *Id.* at 1181 (citations omitted). But, "'[i]f the employee had some plausible purpose to explain his violation of a rule, the defenses of violation of safety rules or willful misconduct are inapplicable, even though the judgment of the employee [may] have been faulty.'" *Id.* (citation omitted). Given the "sincerely-held conflicting views as to the merits of seat belts," *Pasakarnis*, 425 So. 2d 1141, 1146 (Fla. 4th DCA 1982), the state probably could not prove willful refusal to comply with Rule 13B-13.12.

21. 451 So. 2d 447 (Fla. 1984).

22. *Pasakarnis*, 425 So. 2d at 1141; *Lafferty v. Allstate Ins. Co.*, 425 So. 2d 1147, 1151 (Fla. 4th DCA 1982).

"Comparative negligence" as used in this Comment refers not only to the rule by which a claimant's award may be reduced in proportion to his percentage of fault, *see infra* note 34, but also to a claimant's causal negligence evaluated under comparative negligence principles. To avoid confusion, "contributory negligence" will be used solely to implicate the older

of a motorist's failure to use his seat belt could be considered by a jury in assessing an injured party's damages.²³

In *Pasakarnis*, Menninger ran a stop sign and collided with a jeep in which Pasakarnis was riding. The jeep flipped and Pasakarnis—who was not wearing a safety belt—was thrown from his vehicle to the pavement, seriously injuring his back.²⁴ As an affirmative defense, Menninger alleged that Pasakarnis' failure to use his seat belt was negligence because the safety device would have prevented or minimized his personal injuries. Menninger contended that Pasakarnis' damages should be reduced in proportion to his negligence. The trial court granted Pasakarnis' motion to strike Menninger's affirmative defense, deferring to Florida law's well-established refusal to recognize a duty to wear a seat belt.²⁵ However, the court allowed Menninger to depose an engineer-accident analyst. The expert stated that had Pasakarnis worn his seat belt and shoulder harness he would not have been tossed from the jeep, thus sparing him from major injuries. Without hearing this testimony, the jury found Menninger 100% responsible for the accident and therefore liable for the total damages—\$100,000. A divided Fourth District Court of Appeal affirmed.²⁶ *Pasakarnis* provided the Florida Supreme Court with its first opportunity to examine the seat belt defense.²⁷

The supreme court viewed the lower courts' customary exclusion of seat belt evidence as "an illogical exception to the doctrine of comparative negligence,"²⁸ and pronounced the seat belt defense "viable."²⁹ In doing so, the court rejected a rule that failure to wear a seat belt amounts to negligence per se because the legislature had not mandated seat belt use.³⁰ Because the doctrine of comparative

rule—no longer recognized in Florida—by which a claimant who failed to use reasonable care could be completely barred from recovery.

23. *Pasakarnis*, 451 So. 2d at 449.

24. *Id.*

25. The leading case was *Brown v. Kendrick*, 192 So. 2d 49 (Fla. 1st DCA 1966). In *Brown*, the defendants tried to raise the defense of contributory negligence based upon plaintiff's failure to buckle up. The First District affirmed the trial court's decision to strike the seat belt defense, claiming that "it is not within the province of this court to legislate on the subject . . ." *Id.* at 51. The First District said the defendant could not prove, except by conjecture, that plaintiff's use of a seat belt would have prevented her injuries. At that time contributory negligence, if proven, would have barred all recovery; the court's reluctance to recognize a seat belt defense was, therefore, understandable.

26. *Pasakarnis*, 451 So. 2d at 450.

27. *Id.*

28. *Id.* at 453.

29. *Id.*

30. *Id.* at 453-54.

negligence applies only when a plaintiff's negligence is a cause of the accident—as opposed to behavior that makes his injuries more severe—the court refused to allow seat belt nonuse to be considered comparative negligence.³¹ Instead the court settled on an approach similar to that taken by the New York Court of Appeals in its seminal decision, *Spier v. Barker*.³² Thus, depending upon the circumstances of the case, a plaintiff's failure to wear a safety belt could amount to a failure to use reasonable care. The defendant must plead and prove that the plaintiff did not buckle up, that his failure to do so was unreasonable under the circumstances, and that the plaintiff's injuries were causally related to his nonuse. If there is competent evidence proving that nonuse of a seat belt caused or substantially contributed to all or even part of a plaintiff's injuries, the jury should consider that evidence in the computation of damages. The court cautioned that failure to use a seat belt must not be considered in resolving the issue of liability unless such nonuse was found to have been a proximate cause of the accident.³³

This approach requires a jury to distinguish between conduct that caused the accident and that which contributed to the plaintiff's injuries. To confuse the two and allow seat belt nonuse to affect apportionment of fault when nonuse was not a cause of the accident not only risks unfairly increasing a plaintiff's liability if there is a counterclaim,³⁴ but also risks reducing a plaintiff's award twice for the same failure.³⁵ A plaintiff may, however, suffer a double reduction in damages if the jury finds his negligence contributed to causing the accident, and that his failure to wear a seat

31. *Id.* at 454.

32. 323 N.E.2d 164 (N.Y. 1974).

33. *Pasakarnis*, 451 So. 2d at 454.

34. *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973), converted Florida into a comparative negligence jurisdiction. The court noted that when the negligence of the plaintiff is at issue, there will undoubtedly be a counterclaim. When this occurs, the jury must apportion fault between the two claimants; each claimant will then receive an award which reflects the proportion of his damages caused by the other party. Thus, if seat belt nonuse were added to the comparative fault equation, the plaintiff would not only see his award reduced in proportion to his improperly augmented comparative negligence, he also would owe the defendant a greater share of defendant's damages.

35. This anomaly could occur because plaintiff's damages are reduced first for any fault on his part, and then the amount attributable to his failure to wear a seat belt is subtracted from the sum remaining. See *infra* note 103 and accompanying text. If the plaintiff's proportion of the fault were improperly to reflect his seat belt nonuse, the plaintiff would suffer an unfair "double dip" into his damages award. Although this should not happen in practice, the plaintiffs' bar complains that it does, and that consequently the two-part damage reduction process is unfair to plaintiffs. See *infra* note 97 and accompanying text.

belt caused some or all of his injuries, wholly or in part.³⁶ When this occurs the trial court must first reduce the amount of damages by the proportion of fault borne by the plaintiff, and then reduce any remaining damages by the percentage owing to his failure to use a seat belt.³⁷

The supreme court in *Pasakarnis* imposed upon Florida motorists a duty to buckle up whenever reasonable under the circumstances. A critical drawback to this decision is its potential to devastate the layman who learns too late—when he is injured and in court—that the law not only expects a degree of care not currently exercised by most people,³⁸ but also exacts a high price for falling short of the ideal.

While drafting the seat belt law, *Pasakarnis* loomed large. The legislature faced a choice: should it curb a little “judicial policy making”³⁹ or concur with the state’s highest court?

D. Federal Motor Vehicle Safety Standard 208

An appreciation of all the issues encountered during the evolution of the FSBL is impossible without a basic understanding of Federal Motor Vehicle Safety Standard 208,⁴⁰ a regulation concerning occupant crash protection. As amended in 1984,⁴¹ this standard requires automobile manufacturers to install automatic protection systems in passenger cars for sale in this country in accordance with a schedule designed to increase the percentage of automobiles so equipped. But the regulation gives states an opportunity to preclude the introduction of automatic protection systems by adopting mandatory seat belt use laws which meet certain criteria.

Standard 208 was adopted in 1967⁴² as one of the rules developed by the Department of Transportation in response to the National Traffic and Motor Vehicle Safety Act of 1966.⁴³ The Act directs the secretary of transportation to issue practical, objective

36. *Pasakarnis*, 451 So. 2d at 545.

37. *Id.*

38. The legislature was repeatedly reminded that only about 20% of this state’s population currently buckles up regularly. If so, Florida is likely enjoying a higher usage rate than other states. See *Pasakarnis*, 451 So. 2d at 455 n.3 (Shaw, J., dissenting).

39. *Id.* at 456.

40. 49 C.F.R. § 571.208 (1985).

41. 49 Fed. Reg. 29010 (1984).

42. 32 Fed. Reg. 2408, 2415 (1967).

43. 15 U.S.C. §§ 1381-1431 (1982).

auto safety standards.⁴⁴ Standard 208 specifies vehicle performance levels for protecting occupants when the vehicle crashes.⁴⁵ Its purpose is to reduce highway deaths and the severity of injuries through the use of active restraints, such as seat belts, and passive restraints that require no action by a passenger, such as airbags.⁴⁶

The regulation requires manufacturers to install in each passenger car a protection system meeting the requirements of one of three options detailed in the rule.⁴⁷ The first option is the most demanding. By a combination of passive restraints and seat belt assemblies,⁴⁸ the vehicle must meet the frontal, lateral, and roll-over crash protection requirements prescribed by the standard.⁴⁹ The second option requires installation of passive restraint devices and seat belt assemblies which allow the vehicle to meet the frontal crash protection requirements in a perpendicular impact.⁵⁰ The specifications of the third, and most commonly selected option, are satisfied by the installation of seat belt assemblies only.⁵¹

Manufacturers began to lose the freedom to choose between options on September 1, 1986.⁵² After that date, a percentage of each manufacturer's fleet must comply with the rigorous first option. The minimum number of cars required to have automatic restraint systems will increase annually until September 1, 1989.⁵³ Each passenger car manufactured on or after that date must be equipped with an automatic protection system which conforms to the first option. By passing mandatory seat belt use laws that meet the Department's criteria, however, states can bring about the repeal of the requirement for passive restraint systems.⁵⁴ The rule stipulates that if the secretary of transportation determines by April 1, 1989,

44. *Id.* § 1392(a).

45. 49 C.F.R. § 571.208 S1 (1985).

46. *Id.* § 571.208 S2.

47. Manufacturers had unrestricted freedom to choose which system to include in each passenger car assembled before September 1, 1986. *Id.* § 571.208 S4.1.2.

48. *Id.* § 571.208 S4.1.2.1. "'Seat belt assembly' means any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate the results of any accident, including all necessary buckles and other fasteners, and all hardware designed for installing such seat belt assembly in a motor vehicle." *Id.* § 571.209 S3. The rule does not specify airbags. Manufacturers prefer—and are more likely to install—detachable automatic seat belts in order to comply with the standard. SENATE STUDY, *supra* note 6, at 98.

49. 49 C.F.R. § 571.208 S5.1. (1985).

50. *Id.* § 571.208 S4.1.2.2.

51. *Id.* § 571.208 S4.1.2.3.

52. *Id.* § 571.208 S4.1.3.

53. *Id.*

54. *Id.* § 571.208 S4.1.5. In order to influence the secretary's determination, mandatory seat belt laws must meet these minimum criteria:

that seat belt laws apply to at least two-thirds of the country's total population, then manufacturers may again equip cars according to any of the three options.⁵⁵

Whether Florida should attempt to undermine the passive restraint requirements was the subject of much debate in the legislature. Many supporters of the seat belt law wanted mandatory passive restraint requirements as well; they argued that the FSBL should not comply with the federal guidelines. They emphasized the exemptions and the absence of a harsh penalty for noncompliance—factors which made the measure seem less stringent and therefore more palatable. Critics favored conformity with the federal criteria, hoping to reduce the possibility of mandatory airbags. Paradoxically, they argued for more restrictive provisions.

II. FOREGROUND: THE NEW LAW IN A NUTSHELL

The FSBL requires that every operator of a motor vehicle in Florida be "restricted by an appropriately adjusted safety belt which is properly fastened at all times when [the vehicle] is in motion."⁵⁶ Also, the driver must make certain that each front seat passenger less than sixteen years of age is restrained by a safety belt or child restraint device.⁵⁷ Failure to comply with these requirements is unlawful, but noncompliance may not be considered negligence per se nor used as prima facie evidence of negligence in any civil action.⁵⁸ Front-seat passengers sixteen years or older also

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirements are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than \$25.00 (which may include court costs) for each occupant of a car who violates the seat belt usage requirement.

(2) A provision specifying that the violation of the seat belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

Id. § 571.208 S4.1.5.2.

55. *Id.* § 571.208 S4.1.5.1.

56. Ch. 86-49, § 2, 1986 Fla. Laws 173, 174 (to be codified at FLA. STAT. § 316.614(3)(c)).

57. *Id.* (to be codified at FLA. STAT. § 316.614(4)(a)).

58. *Id.* (to be codified at FLA. STAT. § 316.614(10)).

must buckle up;⁵⁹ they may be penalized for not doing so. Violators face a twenty-dollar fine for each offense.⁶⁰ Law enforcement officers, however, may only enforce the seat belt statute as a secondary action—when they suspect the driver has committed a separate infraction which justifies detention. This restriction prevents police from pulling over unrestrained but otherwise innocent motorists.⁶¹

To inform the public of the new law, police may stop and verbally warn persons not in compliance with the FSBL during a grace period extending from July 1, 1986, to December 31, 1986; officers may start issuing citations on January 1, 1987.⁶² In addition, the legislature, recognizing that failure to use seat belts contributes to fatalities and injuries, authorized all police departments and public school systems to "conduct a continuing safety awareness campaign as to the magnitude of the problem and adopt programs designed to encourage compliance with [the FSBL]."⁶³

Not all vehicles are subject to the FSBL mandates. The following are exempt: school buses and buses used for commercial purposes, farm tractors and other implements of husbandry, large trucks of a net weight exceeding 5,000 pounds, motorcycles, mopeds, and bicycles.⁶⁴ Newspaper carriers are not required to wear safety belts while delivering papers, nor are persons "certified by a physician as having a medical condition that causes the use of the safety belt to be inappropriate or dangerous" required to buckle up.⁶⁵ Also, the only passengers in the front seat of a pickup truck required to buckle up are those for whom the manufacturer has provided a seat belt; passengers without safety belts have no obligation to wear them.⁶⁶ Despite reports to the contrary,⁶⁷ persons delivering mail are not expressly excused.

59. *Id.* (to be codified at FLA. STAT. § 316.614(5)).

60. *Id.* § 3, 1986 Fla. Laws at 175 (to be codified at FLA. STAT. § 318.18(9)).

61. *Id.* § 2, 1986 Fla. Laws at 174 (to be codified at FLA. STAT. § 316.614(9)).

62. *Id.* (to be codified at FLA. STAT. § 316.614(7)(a)-(b)).

63. *Id.* (to be codified at FLA. STAT. § 316.614(8)). The legislature said the FSBL would be compatible with the continued support by the state for federal safety standards requiring automatic crash protection, and the enactment of this section should not be used in any manner to rescind or delay the implementation of the federal automatic crash protection system requirements of Federal Motor Safety Standard 208 as set forth in S.4.1.2.1 thereof, as entered on July 17, 1984

Id. (to be codified at FLA. STAT. § 316.614(2)).

64. *Id.* (to be codified at FLA. STAT. § 316.614(3)(a)1.-5.).

65. *Id.* (to be codified at FLA. STAT. § 316.614(6)(a)).

66. *Id.* (to be codified at FLA. STAT. § 316.613(6)(b)).

67. Postal Service letter carriers have been inaccurately identified as exempt from the seat belt law. *Come July 1 it's buckle up or break law*, St. Petersburg Times, June 4, 1986, at A1, col. 3. Sen. George Stuart, Dem., Orlando, made the same mistake when describing

III. THE MAKING OF THE FSBL

The seat belt proposal received early attention in both houses. Representatives Fred Lippman⁶⁸ and Thomas Drage⁶⁹ prefiled House Bill 40. Senate Bill 210, containing the Senate's version of the FSBL, was prefiled by Senators George Stuart⁷⁰ and Edgar Dunn.⁷¹

The FSBL cleared its first important hurdle in the Senate Commerce Committee.⁷² The Senate bill did not exclude from the definition of "motor vehicle" commercial buses, motorcycles, mopeds, and bicycles.⁷³ The bill did not exempt newspaper carriers from wearing seat belts, nor did it limit the number of passengers riding in the front seat of a pickup truck required to buckle up. Finally, the Senate bill did not require that the law be enforced only as a secondary action, and it was silent on the seat belt defense issue. The Senate Commerce Committee exempted newspaper carriers from buckling up while tossing papers⁷⁴ and passed the bill.⁷⁵

While Senate Bill 210 languished in Appropriations, the House Transportation Committee subreferred House Bill 40 to the Subcommittee on Transportation Safety and Motor Vehicles.⁷⁶ House Bill 40 proposed a seat belt statute which would have allowed exemptions for medical purposes only, and would have precluded consideration of seat belt nonuse as a factor in the mitigation of damages.⁷⁷ The Subcommittee revised the House bill to conform to Senate Bill 210, but it also expressly exempted commercial buses,

the bill before the Senate. May 28 Senate Debate, *supra* note 5. An earlier version of the bill provided such an exemption for rural letter carriers. Fla. HB 37 (1985); *see also* Fla. SB 144 (1985) (proposing similar exception).

68. Dem., Hollywood.

69. Repub., Orlando.

70. Dem., Orlando.

71. Dem., Ormond Beach, 1974-1986.

72. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF SENATE BILLS, at 58, SB 210.

73. Fla. SB 210 (1986).

74. Fla. S., Comm. on Com., tape recording of proceedings (Apr. 17, 1986) (on file with committee) (amendment 2 to SB 210) [hereinafter cited as S. Comm. Tape].

75. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF SENATE BILLS, at 58, SB 210.

76. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS, at 205, HB 40.

77. Fla. HB 40 (1986).

mopeds, motorcycles, and bicycles.⁷⁸ The bill passed as a committee substitute.⁷⁹

Two important amendments were added by the House Transportation Committee.⁸⁰ One stipulated that a vehicle may not be stopped solely to enforce the seat belt law, a provision designed to alleviate fear that the police might enforce the FSBL arbitrarily. Also adopted was the limited pickup truck exemption, excusing passengers for whom seat belts are unavailable. This amendment reflected a concern that some passengers—especially children in large, rural families—would opt to ride in a truck's bed rather than break the law and ride in the cab.

Committee Substitute for House Bill 40 underwent one last change on the floor. The members added a provision specifying that a violation of the Act shall not constitute negligence per se nor be regarded as prima facie evidence of negligence.⁸¹ Five days later, the bill passed the House.⁸²

Having gained momentum in the House, the measure was ready to roll through the Senate. Many senators, however, wanted to put on the brakes; the floor fight proved long and exhaustive. At the outset, the Senate adopted nine noncontroversial amendments which conformed the Senate bill to the House version.⁸³ Committee Substitute for House Bill 40 was then brought up in place of the Senate bill. After a series of amendments was considered and rejected, the bill passed.⁸⁴ Governor Graham signed it into law on June 2, 1986.⁸⁵

IV. ISSUES AND INSIGHT

Three difficult and divisive issues shaped the FSBL: the seat belt defense, the federal minimum criteria, and school buses. Highly controversial, each issue threatened to stall the bill's progress.

78. Fla. CS for HB 40 (1986).

79. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS, at 205, HB 40.

80. Fla. H.R., Comm. on Transp., tape recording of proceedings (Apr. 28, 1986) (on file with committee) (amendments by Reps. Gibbons and Bo Johnson to CS for HB 40) [hereinafter cited as H.R. Transp. Tape].

81. FLA. H.R. JOUR. 413 (Reg. Sess. May 14, 1986).

82. *Id.* at 435 (Reg. Sess. May 19, 1986).

83. Compare Fla. SB 210 (1986) with Fla. CS for HB 40 (1986).

84. FLA. S. JOUR. 423 (Reg. Sess. May 28, 1986).

85. Ch. 86-49, 1986 Fla. Laws 173.

A. *Comparative Negligence Versus Mitigation of Damages: The Seat Belt Defense on Trial*

The Senate Commerce Committee and the House Subcommittee on Transportation Safety and Motor Vehicles grappled with what changes, if any, the statute should work on *Pasakarnis*. One proposal considered was that by Senator Langley.⁸⁶

Senator Langley's amendment provided that if a plaintiff were not at fault in causing the accident, then evidence of his failure to use a seat belt would not be admissible at trial to mitigate damages.⁸⁷ Senator Roberta Fox⁸⁸ argued against the Langley amendment. She hypothesized: If "Unbuckled" is stopped at a stop sign and is hit from behind by "Negligent," causing Unbuckled serious injury, Unbuckled could sue Negligent and fully recover. The seat belt defense would be unavailable because Unbuckled was not at fault in causing the accident. Senator Fox argued that Unbuckled caused the damage as much as the collision did because Unbuckled was not wearing the safety belt. Senator Stuart⁸⁹ retorted that a person hit from the rear has in no way caused the accident, other than being unluckily situated.⁹⁰ Senator Fox remained unpersuaded.

The insurance industry opposed the Langley amendment. A spokesman contended that the proposed amendment contravened both the basis of the seat belt measure, which is to create a legal duty to wear a safety belt, and its objective to prevent injury. Promoting that objective, he noted, is the *Pasakarnis* holding. The industry's representative contended that if the amendment passed "people would have less incentive to wear a seat belt than they do right now."⁹¹

A representative for the Academy of Florida Trial Lawyers offered a contrary viewpoint. Describing *Pasakarnis* as a "post-accident, post-injury seat belt law," he denounced the decision as one of which the public generally is not aware until after an accident and injury. Injured motorists then find that damages are reduced because they failed to wear a seat belt.⁹² The trial bar argued that even with the amendment the bill would create a legal duty to

86. Repub., Clermont.

87. S. Comm. Tape, *supra* note 74 (amendment 2 to SB 210 (1986)).

88. Dem., Coral Gables, 1982-1986.

89. Dem., Orlando.

90. S. Comm. Tape, *supra* note 74.

91. *Id.* (remarks of Vincent Rio, Esq.).

92. S. Comm. Tape, *supra* note 74 (remarks of Eric Tilton, Esq.).

wear a safety belt. Moreover, a violation of that duty would be evidence of comparative negligence. Therefore, the trial lawyer's representative believed the incentive to buckle up would remain powerful, thus serving the bill's stated objective—the prevention of injuries.⁹³ He reminded the committee, however, that “there is a difference” between the issues of comparative negligence and the mitigation of damages.⁹⁴

The Langley amendment failed. Ironically, this attempt to make the statute more fair would have made it less so. The amendment would have partially overruled *Pasakarnis*. While fault-free plaintiffs would have avoided the seat belt defense, others partially at

93. The incentive to buckle up would have been less powerful with the Langley amendment. The situation to which the Langley amendment would have applied—involving a completely faultless plaintiff—presupposes that the failure to wear a seat belt was not a cause of the accident. In such a situation the statutory violation would not be admissible as evidence bearing on comparative negligence, nor would it have been admissible under the Langley amendment on the issue of mitigation of damages. In short, the Langley amendment would have diluted the incentive to buckle up by creating immunity for fault-free plaintiffs.

94. S. Comm. Tape, *supra* note 74. The difference is subtle. “[T]he doctrine of comparative negligence . . . involves apportionment of the loss among those whose fault contributed [to] the occurrence [of the accident].” *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973). As such, comparative negligence contemplates the plaintiff's conduct before any damage occurs. PROSSER, *THE LAW OF TORTS* § 65, at 423 (4th ed. 1971). Mitigation of damages, in this context a synonym for the seat belt defense, refers not only to the process by which a plaintiff may be penalized for not using a seat belt, but also alludes to plaintiff's duty to mitigate damages under the rule of avoidable consequences—a concept integral to the seat belt defense. Coming “into play after a legal wrong has occurred, but while some damage may still be averted, [the doctrine of avoidable consequences] bars recovery only for such damages.” *Id.* (footnote omitted). Both contributory negligence and avoidable consequences “rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standard of the reasonable man under the circumstances.” *Id.* (footnote omitted). Pre-accident conduct usually does not contribute to the occurrence of the accident (and hence is not “fault”) but may avert some damages. The New York Court of Appeals explained,

We concede that the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise, and that the chronological distinction, on which the concept of mitigation [of] damages rests, is justified in most cases. However, in our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident.

Spier v. Barker, 323 N.E.2d 164, 168 (N.Y. 1974). The Florida Supreme Court approved this rationale when it recognized the seat belt defense. *Pasakarnis*, 451 So. 2d 447 (Fla. 1984). In Florida, unlike New York—which at the time *Spier* was decided had not yet adopted comparative negligence—the philosophy of individual responsibility underlying the doctrine of comparative negligence also helped legitimize the seat belt defense. This confirms Professor Schwartz's view that “[w]hen a state has a general system of comparative negligence, apportioning damages is much easier in the seat-belt cases because the courts are accustomed to dealing with damage apportionment between negligent plaintiffs and defendants.” V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 4.6, at 97 (1974).

fault would not. In Senator Fox's hypothetical, it was easy to sympathize with Unbuckled and difficult to see why Unbuckled's damages should be reduced for failing to buckle up. Were this the only scenario, the Langley amendment might have passed. But adding another driver to the hypothetical exposes the amendment's weakness. Suppose that upon impact Negligent nudges Unbuckled into the path of a third motorist, "Slightly Speeding." In the ensuing lawsuit, the jury apportions ninety-five percent of the fault to Negligent and five percent to Slightly Speeding. Slightly Speeding, who was also unbuckled, suffers a significant reduction in damages for failing to wear his seat belt. It is inequitable that the two plaintiffs, Unbuckled and Slightly Speeding, would be treated differently when both failed to buckle up. Negligent would receive a windfall because Slightly Speeding was partially at fault.

As this hypothetical illustrates, the Langley amendment would have illogically immunized fault-free plaintiffs from the *Pasakarnis* rule. When an award is reduced because the plaintiff failed to wear a seat belt, it is not because such failure caused the accident but because it exacerbated the plaintiff's injuries. A plaintiff's comparative negligence does not make his failure to wear a seat belt any more blameworthy, nor does a lack of comparative negligence make nonuse reasonable. Fortunately, the Senate Commerce Committee did not adopt the Langley amendment.

The House Subcommittee also wrestled with issues surrounding the seat belt defense, focusing on whether the failure to buckle up should be considered comparative negligence or continue to be regarded as a separate factor for which damages may be mitigated. The Subcommittee considered an amendment by Representative Morse⁹⁵ which would have permitted proof of seat belt nonuse to be admitted as evidence of comparative negligence if the plaintiff's damages were caused by his failure to buckle up. The amendment would have precluded consideration of this evidence as relevant to the mitigation of damages.⁹⁶

Representative Morse argued that this provision would preclude a double reduction in a plaintiff's damages, referring to the two-part *Pasakarnis* process by which an award is first reduced by the percentage of comparative negligence, if any, and then further re-

95. Repub., Miami.

96. This amendment was identical to a provision which had appeared in HB 40 (1986) and CS for HB's 37, 47 & 70 (1985).

duced for failure to mitigate damages by wearing a seat belt.⁹⁷ However, Representative Drage said some interest groups and legislators believed the better course was to let the courts decide the issue.⁹⁸ The amendment almost certainly would have abrogated the seat belt defense; however, being evenhanded in its application, the amendment was a more reasonable alternative to existing law than was Senator Langley's proposal. In any event, the Subcommittee rejected it.⁹⁹

Interestingly, advocates of the Morse amendment did not describe the measure as one calculated to overrule *Pasakarnis* by abolishing the seat belt defense. Instead they framed the issue in terms of "fairness," emphasizing the double reduction of a plaintiff's award when the seat belt defense is successful.¹⁰⁰ Virtually ignored was the fact that the deductions are for two distinct actions which usually are mutually exclusive. Though antagonistic toward the seat belt defense, the proponents of the Morse amendment explained that the failure to buckle up would still be admissible as evidence of comparative negligence,¹⁰¹ implying that the award could be reduced for such failure.

It would be conceptually awkward and unfair to combine the plaintiff's percentage of comparative fault with the percentage by which his damages were increased by his failure to wear a seat belt. Such an approach might be feasible in a simple case absent a counterclaim, but when the defendant is also a claimant, the apportionment of comparative fault affects the liability of each party to the other.¹⁰² In only a few instances will a plaintiff's failure to buckle up put him at fault in the accident and contribute to the defendant's injuries.¹⁰³ That failure, therefore, should not expose the

97. Rep. Morse's beliefs were influenced by critics of the double reduction. One critic said most trial lawyers argue that a plaintiff suffers a reduction in damages twice due to his failure to wear a seat belt—once from comparative negligence, then from mitigation of damages. Fla. H.R., Subcomm. on Transp. & Motor Vehicles, tape recording of proceedings (Apr. 23, 1986) (on file with committee) (remarks of Eric Tilton, Esq.) [hereinafter cited as H.R. Transp. Subcomm. Tape].

98. *Id.* Informing the Subcommittee how the amendment would change the existing law, Rep. Drage said, "Not wearing seat belts would be taken into consideration as part of the comparative negligence [equation] and there would only be one determination at that time" *Id.*

99. H.R. Transp. Subcomm. Tape, *supra* note 97.

100. *Id.*

101. *Id.*

102. *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973); *see supra* note 34.

103. As the *Pasakarnis* court realized, "[a] different situation would be presented if the defendant alleged and proved that the plaintiff's negligent failure to wear a seat belt was a contributing cause of the accident." In that event, evidence of seat belt nonuse would be

plaintiff to greater liability for the defendant's damages in a counterclaim. Further, it is doubtful whether the failure to wear a seat belt can be fairly compared with comparative negligence. The Fourth District Court of Appeal illustrated this point dramatically in *Lafferty v. Allstate Insurance Co.*¹⁰⁴

We . . . have great difficulty comparing the negligence of failing to buckle up with the negligence of causing an accident. The unbuckled plaintiff's conduct seems mild and acceptable while sitting innocently at a stoplight when contrasted with a hypothetical speeding and intoxicated driver who is 100% at fault in the resulting rear end collision.¹⁰⁵

Thus examined, the contention that the seat belt defense would survive as a form of comparative negligence seems obfuscatory. Courts, unable to apply the seat belt defense consistently, might well have abandoned it.

To be sure, the approach approved by the Senate Commerce Committee and the House committees—legislative silence regarding the seat belt defense—would also have had ramifications not readily apparent to the committees. Had the legislature remained silent on this issue, it would have rendered an implicit statement about the standard of care expected of reasonably prudent persons. Failure to wear a safety belt in violation of the statute would most likely have been found unreasonable per se,¹⁰⁶ a strict rule rejected

admissible as to the liability. *Pasakarnis*, 451 So. 2d at 454 n.3. Apparently confronting that situation, a New York court commented:

Of course, if the jury determines that plaintiff's failure to wear a seat belt was contributory negligence then . . . it must consider such failure in apportioning liability. However, that conduct may not again be considered in mitigation of damages. This would amount to a double reduction of plaintiff's damages based upon the same conduct, which would be entirely inappropriate.

Curry v. Moser, 454 N.Y.S.2d 311, 316 (N.Y. App. Div. 1982). This seems a sensible approach to such a situation, one that should be followed by Florida courts.

104. 425 So. 2d 1147 (Fla. 4th DCA 1982).

105. *Id.* at 1151.

106. If a statute "establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury," then the violation of that statute is negligence per se. *DeJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198, 201 (Fla. 1973) (citation omitted). For the statutory violation to constitute actionable negligence, a plaintiff must establish that "he is of a class the statute was intended to protect, that he suffered injury of the type the statute was designed to prevent, and that the violation of the statute was a proximate cause of his injury." *Id.* at 201. This "established law applies with equal force" to a defendant who asserts a comparative negligence defense. *Rex Utils., Inc. v. Gaddy*, 413 So. 2d 1232, 1234 (Fla. 3d DCA 1982) (citation omitted). Presumably, it also would have applied to a defendant raising the affirmative seat belt defense, because one of

in *Pasakarnis*. Though less likely, seat belt nonuse could have been pronounced *prima facie* unreasonable.¹⁰⁷ Either way, the FSBL would have changed the existing law by lifting from the defendant the burden of establishing that a plaintiff's failure to wear a seat belt was unreasonable under the circumstances, making it much easier to prevail with the seat belt defense.

The Renke amendment resolved the issue.¹⁰⁸ Representative Renke¹⁰⁹ urged that without his amendment the measure would change Florida's law with respect to automobile accidents.¹¹⁰ Representative Woodruff¹¹¹ concurred: "All this amendment does is keep the law in regard to the evidence of seat belts in cases exactly the way it is, rather than expanding it which we didn't intend to do" ¹¹²

This point was reiterated by Representative Simon,¹¹³ who explained that the amendment ensured that the burden of proof in negligence actions with respect to the unreasonableness of the plaintiff's failure to wear a seat belt would remain on the defendant. Instead of being negligence *per se* or *prima facie* evidence of negligence, a statutory violation will simply be some evidence of

the elements it shares with comparative negligence is that the defendant must demonstrate that the plaintiff failed to use reasonable care under the circumstances. Because of this overlap between the two defenses, it would not be necessary to label the seat belt defense comparative negligence to admit evidence of violation of the statute. The statute would simply have established as a matter of law the standard of reasonable care, relieving the defendant of the burden of showing that the plaintiff's nonuse was unreasonable. The defendant would still have had to prove causation, of course.

107. When a statutory violation is not negligence *per se*, it may be considered *prima facie* evidence of negligence. This is also the rule regarding violations of traffic regulations, which are distinguished from other penal statutes. *DeJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198, 201 (Fla. 1973). Although the FSBL is a traffic safety regulation, violation would probably be found unreasonable *per se*. An analogous law is FLA. STAT. § 316.211(1) (1985), requiring motorcyclists to wear helmets. Although it is a traffic safety regulation, its violation constitutes negligence *per se*. *Rex Utils., Inc. v. Gaddy*, 413 So. 2d, 1233, 1234 (Fla. 3d DCA 1982). In *Gaddy*, a pre-*Pasakarnis* decision, the court considered whether the plaintiff's failure to wear headgear—a statutory violation—was comparative negligence. The court rejected the defense because the defendants failed to establish that the plaintiff's failure to wear headgear was a proximate cause of her injuries. *Id.* Even if a violation of the law could have been considered *prima facie* evidence of a failure to exercise due care, that presumption could have been overcome by other facts and circumstances. *Clark v. Sumner*, 72 So. 2d 375, 378 (Fla. 1954).

108. See *supra* note 81 and accompanying text.

109. Repub., New Port Richey.

110. Fla. H.R., tape recording of proceedings (May 14, 1986) (on file with Clerk) [hereinafter cited as May 14 House Debate].

111. Repub., St. Petersburg.

112. May 14 House Debate, *supra* note 110.

113. Dem., Miami.

negligence to be considered with all the facts of the case.¹¹⁴ To prevent any misunderstanding, Representative Renke later read a statement of legislative intent making it clear that the amendment was not designed to alter the *Pasakarnis* rule regarding mitigation of damages. Rather, it was designed to ensure that a violation of the seat belt law alone would not amount to negligence per se or prima facie evidence of negligence "for any comparative negligence purposes."¹¹⁵ Though there was lingering concern that the failure to wear seat belts would be deemed comparative negligence, it would have been neither necessary nor desirable to convert the seat belt defense into comparative negligence.¹¹⁶

Because the legislature was unwilling to overrule *Pasakarnis* and abolish the seat belt defense, the approach agreed upon was sensible. The legislature confirmed the wisdom of the "very practical viewpoint" that

the failure to expend the minimal effort required to fasten an available safety device which has been put there specifically in order to reduce or avoid injuries from a subsequent accident is, on the very face of the matter, obviously pertinent and thus should be deemed admissible in an action for damages, part of which would have been sustained if the seat belt had not been used.¹¹⁷

By refraining from imposing an inflexible standard of care, the legislature acknowledged that most people do not usually use their seat belts—an indication that reasonable care does not require buckling up. Because some people believe seat belts cause injuries in some circumstances, juries may find the decision to forego using them a reasonable one.¹¹⁸ The seat belt defense survived a severe trial. It will remain in the law unchanged.

B. *The Federal Rule*

A question that came up continually in both houses was whether the bill should conform to the federal rule's minimum criteria for state mandatory safety belt laws. The issue dominated the House

114. May 14 House Debate, *supra* note 110.

115. FLA. H.R. JOUR. 435 (Reg. Sess. May 19, 1986) (statement of intent).

116. *See supra* note 94.

117. *Insurance Co. of N. Am. v. Pasakarnis*, 425 So. 2d 1141, 1143 (Fla. 4th DCA 1982) (Schwartz, J., dissenting), *quoted with approval in Insurance Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 453 (Fla. 1984).

118. *Pasakarnis*, 425 So. 2d at 1146.

Transportation Committee's discussion. Representative Armstrong¹¹⁹ introduced two amendments intended to bring the bill into compliance with the minimum criteria. He argued that any seat belt law should conform to federal guidelines, thus making the Florida law a vote to veto federal rules mandating automatic restraint systems. Otherwise, he said, "this bill will . . . mandate the use of airbags."¹²⁰

The first Armstrong amendment, a proposal which would have deleted the exemption granted newspaper carriers, initially passed.¹²¹ But Representative Gibbons¹²² moved to reconsider.¹²³ Representative Lippman, concerned that the amendment would slow the bill's progress through the legislature, urged members to vote against the amendment. Representative Drage was concerned that the committee did not understand that the amendment removed an exemption. Upon reconsideration the amendment failed.¹²⁴ Representative Armstrong then withdrew his second amendment, which would have increased the penalty to twenty-five dollars.¹²⁵ This amendment alone could not have conformed the bill to federal criteria. The committee's turnabout on this amendment exemplifies the confusion that surrounded the issue.

Some legislators believed the measure conformed too closely to the federal minimum criteria, threatening to undermine the federal government's mandate to the manufacturers to install passive restraints. On the floor, Representative Deutsch¹²⁶ proposed an amendment to repeal the measure automatically "immediately upon the date that the Secretary of the United States Department of Transportation determines to rescind the portion of the Federal Motor Vehicle Safety Standard 208 . . . which requires the installation of automatic restraints."¹²⁷ He argued that the bill, though in "technical" noncompliance with the federal rule, was not in "le-

119. Dem., Plantation.

120. H.R. Transp. Tape, *supra* note 80.

121. *Id.*

122. Dem., Tampa, 1984-1986.

123. H.R. Transp. Tape, *supra* note 80.

124. *Id.*

125. *Id.*

126. Dem., Tamarac.

127. FLA. H.R. JOUR. 413 (Reg. Sess. May 14, 1986) (amendment 1 to HB 40). The amendment also provided that the seat belt law would not be automatically repealed if the secretary of transportation's decision to rescind the passive restraint requirements were not based on the enactment of seat belt laws. *Id.*; cf. CAL. VEH. CODE § 27315 (West Supp. 1986) (sunset provision).

gal" noncompliance¹²⁸ and could therefore be used to invalidate the federal passive restraint requirements—ultimately resulting in decreased protection for those who refused to wear safety belts.¹²⁹ Rejecting this gloomy forecast, the House tabled the amendment.

In the Senate a similar proposal was made by Senator Gersten,¹³⁰ and his arguments resembled those of Representative Deutsch.¹³¹ Reminding his colleagues that the House was likely to reject last-minute changes, Senator Stuart reassured the Senate that the bill was "carefully crafted" to fall short of the federal criteria, and that it did not comply with them.¹³² He insisted that a sunset provision was unnecessary.¹³³ Senator Scott¹³⁴ wanted to know "why [are we] not making this law so that you don't have to have one of those expensive airbags¹³⁵ if you have seat belts in your car?"¹³⁶ Senator Stuart limited the issue: "I do not believe we ought to make a decision on airbags. That is a decision left to the federal government, because it's a manufacturing issue [affecting] the whole country."¹³⁷ Senator Gersten, however, would not concede that the Florida measure was deficient enough to avoid influencing the secretary's decision regarding the repeal of the automatic restraint requirements. Nevertheless, the amendment failed.¹³⁸

128. May 14 House Debate, *supra* note 110.

129. Rep. Deutsch predicted that no more than 40% of Florida's population would comply with the law. Therefore, he said that if the secretary were to repeal the federal passive restraint requirements, the majority of motorists would continue to travel unprotected. If the FSBL were used to rescind the federal requirements, the law would harm rather than protect Florida motorists. *Id.*

130. Dem., South Miami, 1981-1986.

131. May 28 Senate Debate, *supra* note 5.

132. In addition to the intent language, *see supra* note 63, the FSBL by design fails to meet the minimum criteria in two ways: (1) the penalty, \$20, is less than the \$25 fine demanded by the federal standard, and (2) the FSBL offers more exemptions than the federal regulation allows.

133. Sen. Stuart also averred that none of the 25 states that previously passed mandatory seat belt laws had conformed their statutes to the federal minimum criteria. All these laws, he claimed, are deficient in some way. Therefore, he argued that the FSBL would be irrelevant to the decision regarding the fate of the federal requirements.

134. Repub., Ft. Lauderdale.

135. The major American automobile manufacturers have estimated that airbags will cost consumers in excess of \$800 per car. 49 Fed. Reg. 28969 (1984). Automatic seat belts by contrast, are much less expensive. General Motors says it can add automatic seat belts for an additional \$45, Chrysler claims it would cost \$115, Honda pushes the price to \$150, and Nissan and Renault estimate it will cost \$200 or more.

136. May 28 Senate Debate, *supra* note 5.

137. *Id.*

138. FLA. S. JOUR. 422 (Reg. Sess. May 28, 1986) (amendment 2 to CS for HB 40).

C. School Bus Safety

Perhaps the problem most agonized over was the school bus issue. The seat belt law could have required children on school buses to wear seat belts. This sounds reasonable until the enormous expense is considered; in 1985 the Department of Education estimated that equipping Florida's school buses with seat belts would cost \$30 million.¹³⁹ Requiring school buses to be equipped with safety belts would have forced the bill back into Appropriations where, because of the costs, the bill would have died. Representative Shackleford¹⁴⁰ introduced such an amendment anyway, insisting it was not a ploy to kill the bill. "I don't know what the cost is," he confessed, but "I don't know what a life is worth."¹⁴¹ Arguing against the proposal, Representative Kimmel¹⁴² cited studies suggesting that seat belts were inappropriate in school buses.¹⁴³ He said the best way to save school children's lives would be to turn bus seats backwards.¹⁴⁴

Though the House defeated the school bus amendment, it reappeared in the Senate. Senator Don Childers¹⁴⁵ reduced the complex issue to a simple test: "[I]f we're really concerned about the safety of the people of the state of Florida, you'll support this amendment; if we're not concerned about the safety of the people of the state of Florida, you'll oppose this amendment."¹⁴⁶ This challenge left the bill's supporters in a dilemma. Senator Dunn acknowledged the problem of school bus safety but was mindful of the high cost involved in requiring school bus seat belts. Dunn pointed out that adopting the amendment would consign the seat belt bill to Appropriations and, presumably, oblivion.¹⁴⁷ This, he noted, was paradoxical: "[It would] kill this bill because of our desire to broaden the scope of its effect."¹⁴⁸

139. Staff of Fla. S. Comm. on Com., SB 144 (1985) Staff Analysis 2 (rev. Apr. 25, 1985) (on file with committee).

140. Dem., Palmetto.

141. May 14 House Debate, *supra* note 110.

142. Repub., West Palm Beach, 1980-1982, 1984-1986.

143. Rep. Kimmel claimed that crash studies by Transport Canada showed "that because the belt holds [children] in place," their heads hit the seats in front upon collision. May 14 House Debate, *supra* note 110.

144. *Id.*

145. Dem., West Palm Beach.

146. May 28 Senate Debate, *supra* note 5.

147. *Id.*

148. *Id.*

The school bus amendment presented opponents the delightful opportunity to scuttle the seat belt bill yet trumpet sincere concern for safety. Senator Myers¹⁴⁹ stated that if the reason for refusing to require school bus passengers to buckle up was strictly economics, "that's a sad statement on the policy of the legislature, and I think you ought to vote for this amendment."¹⁵⁰ Another senator added that if seat belts were good in cars, they would even better in school buses.¹⁵¹ The school bus amendment met with defeat;¹⁵² however, the issue seems likely to reappear.¹⁵³

V. A PERPLEXING PROBLEM AND A SIMPLE SOLUTION

While the FSBL was stirring up controversy, the child restraint law was quietly amended. Appearing in both the Senate and House bills,¹⁵⁴ the amendments to the child restraint law breezed through the committees and ended up intact in the Committee Substitute for House Bill 40. As amended, the statute now requires that every operator of a motor vehicle properly secure any passenger five years old or younger.¹⁵⁵ Tourists and babysitters now must obey the child restraint law, and those charged with its violation will no longer be able to avoid paying the fine by proving that a child restraint device was purchased later. That defense has been deleted.¹⁵⁶ Like the FSBL, the child restraint law now affects anyone who drives in this state; however—and it is imprecise on this point—the FSBL apparently does not overlap the child restraint law's provisions, allowing that older statute to control in the situations to which it applies.¹⁵⁷ Thus, under the child restraint law,

149. Repub., Hobe Sound.

150. May 28 Senate Debate, *supra* note 5.

151. May 28 Senate Debate, *supra* note 5 (remarks by Sen. Deratany).

152. FLA. S. JOUR. 422-23 (Reg. Sess. May 28, 1986) (amendment 4 to CS for HB 40).

153. New York, the first state to pass a mandatory seat belt law, is again in the vanguard. On August 14, 1986, Gov. Mario Cuomo of New York signed into law a bill requiring that all new school buses delivered to that state be equipped with seat belts and extra padding on the tops and back of passenger seats. Under the law, which takes effect July 1, 1987, up to 90% of the cost—about \$1,500 per bus—will be paid by the state. Whether old buses should be modified has been left to local school boards. New York's law does not require that students use the safety belts, and it immunizes school districts and drivers from liability if children are injured while unbuckled. *Bill on Seat Belts Signed by Cuomo*, New York Times, Aug. 15, 1986, at A10, col. 1.

154. Compare Fla. SB 210 (1986) with Fla. CS for HB 40 (1986).

155. Ch. 86-49, § 1, 1986 Fla. Laws 173 (amending FLA. STAT. § 316.613(1)-(4) (1985), to be codified at FLA. STAT. § 316.613(1)-(3)).

156. *Id.*

157. According to the FSBL, "[i]t is unlawful for any person . . . [t]o operate a motor vehicle in this state unless each front seat passenger under the age of 16 years is restrained

when children less than six years old travel they must be secured regardless of where they sit within the vehicle. By contrast, the FSBL requires operators to make sure that children less than sixteen years old are restrained—but only when they ride in the front seat. Drivers, then, have a more stringent obligation to protect children less than six years of age because they must be properly restrained whether seated in the front or the back of the vehicle.

There is a disparity between the statutes, however, which creates a dilemma. A provision of the child restraint law, untouched by recent amendments, states: "The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence."¹⁵⁸ This shield insulates drivers from civil liability for failing to secure young passengers as required. Because the legislature did not want the FSBL to undermine *Pasakarnis* or sandbag the seat belt defense, the FSBL does not by its terms prohibit introducing evidence of an operator's failure to follow the statute's imperatives.¹⁵⁹ While the admissibility of evidence regarding an individual's failure to secure himself is not in doubt, the child restraint law confuses the issue as to whether evidence of an operator's failure to secure a young front seat passenger—even a child over five years old—is admissible. Consider that under the child restraint law, as explained by Justice Shaw in his dissent in *Pasakarnis*,

a parent who has failed to secure a child in the restraint device can, nonetheless, sue for the wrongful death of the child caused by the negligent driving of the defendant, and the defendant cannot introduce evidence that the parent had not secured the child

by a safety belt or by a child restraint device pursuant to s. 316.613, if applicable." Ch. 86-49, § 2, 1986 Fla. Laws 174 (to be codified at FLA. STAT. § 316.614(4)(a)). Which statute does the operator violate if he transports an unrestrained front seat passenger five years old or younger? Is it the child restraint law, the FSBL, or both? Surely it is the child restraint law only, if the measure's history is any indication. In an earlier version of the FSBL, Fla. HB 40 (1986), the statute specified that "[e]ach operator . . . shall secure all front seat passengers 16 years of age or younger with a properly adjusted and fastened safety seat belt, except that a child who is 5 years of age or younger shall be protected pursuant to the child restraint requirements set forth in s. 316.613." The difference between a violation of the FSBL and the child restraint law is five dollars. The penalty for violation of the FSBL is \$20, Ch. 86-49, § 3, 1986 Fla. Laws 175 (amending FLA. STAT. § 318.18 (1985), to be codified at FLA. STAT. § 318.18(9)), and for a violation of the child restraint law, a \$25 fine may be assessed. FLA. STAT. § 318.18(2) (1985).

158. Ch. 86-49, § 1, 1986 Fla. Laws 173 (to be codified at FLA. STAT. § 316.613(2)).

159. See FLA. H.R. JOUR. 435 (Reg. Sess. May 19, 1986) (statement of intent).

in a restraint device [A] violation of that duty cannot be used to reduce damages.¹⁶⁰

Furthermore, in a suit brought on behalf of an injured child, the child restraint law effectively bars any recovery from an operator who, though not at fault in causing the accident, may have contributed substantially to the infant's injuries by failing properly to restrain the child. A claim for contribution filed against an operator whose failure to provide proper protection aggravated a child's damages would also be precluded. Now suppose the injured child is six years old, outside the scope of the child restraint law, yet covered under the FSBL. The question arises whether the child could sue an operator who failed to secure him. Courts must also determine whether a negligent third party can seek contribution against a driver for failure to secure the child. It is not clear whether the evidence of such failure must be excluded from the trial of any civil action pursuant to the exculpatory provision in the child restraint law or by analogy to that provision.

It is absurd to have a statutory scheme which prevents a child five years old or younger from suing an operator in negligence for the operator's failure to secure the child while permitting a youngster more than five years old to sue a driver because of the same failure. It would be ironic indeed if the children provided "better protection" under the child restraint law were forced to endure worse treatment at common law than might otherwise be available. Conversely, to allow a driver who failed to secure a child to escape civil liability for that failure due to the fortuity that the victim's extremely young age implicated the child restraint law rather than the FSBL would be exceedingly perverse. Indeed, courts cannot construe the statutes this way. Assuming the legislature does not act to change this inconsistency, the only reasonable alternative to the untenable "solution" of excluding claims expressly barred, while allowing those by claimants not "protected" by the child restraint law, is to summarily dismiss any claim founded upon an operator's failure to secure.

And yet, since 1973 Florida has operated under a comparative negligence system,¹⁶¹ and in 1984 the seat belt defense was recognized.¹⁶² Therefore, there is no longer any justification for the exclusion of evidence of an operator's failure properly to secure a

160. *Pasakarnis*, 451 So. 2d 447, 455 (Fla. 1984) (Shaw, J., dissenting).

161. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

162. *Pasakarnis*, 451 So. 2d at 449.

child if a causal connection can be established between that failure and the child's injuries. To acknowledge that failure to fasten one's own seat belt may be unreasonable conduct for which a mitigation of damages may be sought, while denying that the failure to secure a child may likewise constitute unreasonable conduct for which civil liability might be incurred, is incongruent.

However, when the legislature wrote the immunity provision into the child restraint law in 1982, the provision was not such a problem because Florida courts were hostile to the notion that seat belt nonuse might be used to reduce a plaintiff's award. Subsequently support for this position eroded.¹⁶³ The legislature was apparently unwilling to allow the child restraint law to be a catalyst for a major change in the common law, preferring instead to preserve the status quo with respect to the effect of seat belt nonuse on civil liability. Despite the legislative damper, the supreme court subsequently created the seat belt defense in *Pasakarnis*. However, Justice Shaw, citing the child restraint law's immunity provision, argued against the court's decision. He observed the incongruity inherent in ruling that an individual owes himself a duty to minimize his personal injuries by buckling up, when the breach of a statutory duty to secure a child cannot give rise to civil liability. "It seems to me that there would be a greater duty for a parent to protect a helpless child, especially when required by law, than to protect himself."¹⁶⁴

Before the legislature amended the child restraint law and passed the FSBL, this inconsistency, though troublesome, could be explained. The original child restraint law applied only to parents and legal guardians transporting their own children.¹⁶⁵ Because the

163. In *Selfe v. Smith*, 397 So. 2d 348, 349 (Fla. 1st DCA 1981), the court held that the negligent defendants could not plead entitlement to contribution from the parents of a child injured in an automobile accident, where the contribution claim was founded on an allegation that the parents had "negligently failed 'to secure, restrain, or otherwise protect the infant.'" The First District "decline[d] to recognize in the common law (there being no statutory obligation) an asserted duty of parents, the predicate for a potential contribution claim, to install child restraint devices in their vehicles." *Id.* at 351. However, having foreclosed the claim for lack of duty, the court seemed relieved that it "need not advance the conventional, if troublesomely unconvincing, arguments against reducing the damages to be awarded in a comparative negligence state to one whose injury was more serious because he did not buckle an available seat belt." *Id.* In addition to that admission, the court that handed down the venerable *Brown* decision, see *supra* note 25, reserved the question "whether a case for the jury would be presented if the parent present in the car failed to buckle his child in a restraint device already installed." *Id.* at 350.

164. *Pasakarnis*, 451 So. 2d at 455 (Shaw, J., dissenting).

165. FLA. STAT. § 316.613(1)(a) (1985); see *supra* note 13.

statutory duty ran exclusively from parent to child, the immunity provision fit comfortably within the familiar concept of parental immunity—a doctrine under which “the law simply [did] not recognize parental negligence causing injury to the child as an actionable tort.”¹⁶⁶ It is perhaps no coincidence that just before the passage of the child restraint law, the Florida Supreme Court carved out limited exceptions to the aging rule of parental immunity. In *Ard v. Ard*,¹⁶⁷ the supreme court held that in a negligence action by an unemancipated minor against a parent, the parental immunity doctrine is waived to the extent of the parent’s available liability insurance coverage. And, in *Joseph v. Quest*,¹⁶⁸ a companion case to *Ard*, the court announced that contribution is available against a parent but is limited to the liability insurance coverage the parent may have. So, by drafting into the child restraint law a provision guaranteeing parental immunity from civil liability for failing to secure their children, the legislature quietly closed the courtroom door on a potential plethora of intrafamily lawsuits, lawsuits which were, and remain, a legitimate public policy concern.¹⁶⁹

The immunity provision was initially a reasonable device to keep the child restraint law from becoming a vehicle by which children could sue their parents. But the revamped child restraint law and its companion, the FSBL, now create a duty far broader than that envisioned by the earlier law alone. Because parents are no longer the sole possible violators—and thus not the only potential defendants in negligence actions founded upon the failure to secure—the policy considerations cease to be compelling. The nagging inconsistency between *Pasakarnis* and the child restraint law, once but a whisper, is now a scream. In addition, the presence of an immunity

166. *Ard v. Ard*, 414 So. 2d 1066, 1070 (Fla. 1982) (Boyd, J., dissenting) (citations omitted).

167. *Id.* at 1067.

168. 414 So. 2d 1063, 1065 (Fla. 1982).

169. Even the *Ard* court conceded that “[p]rotecting the family unit is a significant public policy behind parental immunity. We are greatly concerned by any intrusion that might adversely affect the family relationship. Litigation between family members would be such an intrusion.” *Ard*, 414 So. 2d at 1067. Nevertheless, the *Ard* court decided that when insurance is available, the lawsuit between child and parent is actually between child and parent’s insurance carrier. Therefore, the suit is “friendly” rather than truly adversary, because a recovery will not deplete the family’s resources but will benefit the family as a whole by easing financial difficulties arising from the child’s injuries. *Id.* at 1068-69. Justice Boyd remained skeptical: “Being on opposite sides of a lawsuit puts people in an adversary position. . . . [T]he interests of parent and child in such a situation conflict in a very real way.” *Id.* at 1070 (Boyd, J., dissenting).

provision in the child restraint law is incompatible with the absence of one in the FSBL; it threatens to restrict the more permissive law. The current situation demands remedial action.

An unrestrained child injured in an automobile accident should have a cause of action against the operator who failed to secure him. If the child is under six years old, defusing the affirmative seat belt defense,¹⁷⁰ a defendant whose negligence caused the accident should nevertheless be able to seek contribution from the operator if the operator's failure to fasten the child's seat belt contributed substantially to the child's injuries. It is illogical, and contrary to the principles of comparative negligence, to require a negligent defendant in such a case to pay all the child's damages. After all, if an unrestrained motorist were to pursue an action for damages, the defendant would not be liable for those injuries substantially produced by the plaintiff's failure to buckle up. Similarly, a child over five years old might not be able to recover the portion of his damages caused by his unreasonable failure to wear a safety belt.¹⁷¹ Yet the law now recognizes that a child between the ages of six and fifteen may not always take proper precautions for his own safety; the law expects another to make sure that a child in this age group is restrained. Why should a child, whose recognized need for supervision has prompted legislative action, be unable to recoup at least a fraction of his otherwise unrecoverable damages from the one who failed to ensure his safety?

Under the circumstances of a particular case, the failure to secure a child may not constitute negligence. The child's age, for example, would be a crucial factor, as might the presence or absence of other adults in the vehicle. However, when the failure to secure is unreasonable, that failure should be admissible as evidence of negligence.

The legislature should act to correct this anomaly. One solution would be to revise the immunity provision so that failure to provide and use a child passenger restraint device shall not constitute

170. As "any . . . child under six years of age is conclusively presumed to be incapable of committing contributory negligence," *Swindell v. Hellkamp*, 242 So. 2d 708, 710 (Fla. 1970), it follows by analogy that a jury must be precluded from finding the failure to buckle up by a child in this age group unreasonable under the circumstances.

171. Nothing in *Pasakarnis* rules out the possibility that a child six years old or older could have damages reduced for failure to wear a seat belt. The child's age, of course, would be one of the circumstances of the case, and the younger the child the more difficult it would be to prove unreasonable behavior. If the defendant could not establish that the child's behavior was unreasonable under the circumstances, then the situation would resemble that described above. See *supra* note 170 and accompanying text.

negligence per se nor shall such violation be used as prima facie evidence of negligence in any civil action.¹⁷² This language resolves the conflict between the child restraint law and the FSBL with respect to civil liability for failure to secure a child and would allow children to sue operators for this failure. Such an approach would not create a new, independent statutory cause of action, but neither would it prevent a common law claim from developing. Rather than being entitled to recovery as a matter of law upon a showing of failure to secure, claimants would still have to establish all elements of actionable negligence. Evidence of the statutory violation would be admissible as part of the case's attendant circumstances.¹⁷³

For now, however, courts have little choice but to follow the unequivocal directive of the child restraint law (presumably applicable, by analogy, to the FSBL as well) to exclude evidence of failure to secure. This robs children of a reasonable cause of action against operators who will have not only violated statutes designed to ensure their safety, but who may have also failed to exercise the reasonable care required by the circumstances.

VI. CONSTITUTIONAL QUESTIONS

Opponents of the FSBL questioned its constitutionality as a governmental intrusion into matters of personal autonomy. The outcry over the new law's supposed intrusiveness, however, is best categorized as hyperbole. The FSBL will probably withstand constitutional challenge.

172. Cf. ch. 86-49, § 2, 1986 Fla. Laws 174 (to be codified at FLA. STAT. § 316.614(10)).

173. With proper limiting instructions, evidence of the violation might be relevant to the issues of duty and proximate cause, as well as evidence of custom or practice. See *Cadillac Fairview, Inc. v. Cespedes*, 468 So. 2d 417, 421 (Fla. 3d DCA 1985) (contemplating the admissibility into evidence of an employer's violation of the Occupational Safety and Health Act (OSHA)). OSHA provides that "[n]othing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees." 29 U.S.C. § 653(4) (1982). On the duty and proximate cause questions, evidence of the statutory violation might overcome reluctance similar to that expressed by the *Selfe* court. See *supra* note 163. While that court hesitated to acknowledge a parental duty to provide child restraint devices, it "[did] not doubt the proposition that the [parents'] failure to buy, install, and use a child restraint device . . . was arguably among the causes-in-fact contributing to [their child's] facial injuries." *Selfe v. Smith*, 397 So. 2d 348, 351 (Fla. 1973) (footnote omitted).

Because mandatory seat belt use laws are recent phenomena,¹⁷⁴ there is a paucity of case law on point. Decisions from New York's lower courts comprise the complete corpus.¹⁷⁵ *People v. Weber*,¹⁷⁶ decided in 1985, purports to be the first case to examine the constitutionality of a mandatory seat belt statute. Weber was charged with violating New York's seat belt law. He contended that the statute contravened the Constitution as an impermissible exercise of the state's police power, that its exemptions created classifications violative of due process and equal protection,¹⁷⁷ and that it was vague.¹⁷⁸

The court disagreed. Calling Weber's first objection untenable, it noted that the police power "extends to any *reasonable* rule . . . designed to promote or protect the public's health, safety or morals."¹⁷⁹ The court determined that the mere act of fastening a seat belt is ordinarily not burdensome, especially after it becomes a habit.¹⁸⁰ The court found the statute "a reasonable and constitutional exercise of the State's police power."¹⁸¹ It also rejected the equal protection challenge because it found the exemptions from the statute reasonable.¹⁸²

174. New York's mandatory seat belt law was the first. It became effective on January 1, 1985. N.Y. VEH. & TRAF. LAW § 1229-c (McKinney Supp. 1986).

175. The Illinois Supreme Court has referred to that state's mandatory seat belt law, ILL. REV. STAT. ch. 95 ½, § 12-603.1 (Supp. 1985), but has not yet passed on its constitutionality. *Clarkson v. Wright*, 483 N.E.2d 268, 273 (Ill. 1985) (Ryan, J., dissenting).

176. 494 N.Y.S.2d 960 (Town Ct. 1985).

177. U.S. CONST., amend. XIV, § 1. New York law exempts taxis, liveries, tractors, trucks with a maximum gross weight of 18,000 pounds or more, and buses other than school buses. N.Y. VEH. & TRAF. LAW § 1229-c(9) (McKinney Supp. 1986). It also exempts school buses. *Id.* However, a new law to take effect in 1987 repeals that exemption. See *supra* note 153.

178. Weber's void-for-vagueness argument attacked the requirement that the safety belts used must be approved by the traffic safety commissioner. He argued "that 'an ordinary person has no way of knowing which safety belts are approved by the Commissioner.'" *Weber*, 494 N.Y.S.2d at 962. The court rejected this contention, deciding the requirement gave certainty to the law by providing a process for approval or rejection of specific kinds of seat belts and precluding jerry-rigged substitutes. *Id.* at 964.

A similar vagueness argument would be even less effective in Florida because the FSBL defines safety belt to mean "any seat belt assembly that meets the requirements established under Federal Motor Vehicle Safety Standard 208, 49 C.F.R. s. 571.208." Ch. 86-49, § 2, 1986 Fla. Laws 174 (to be codified at FLA. STAT. § 316.614(3)(b)). Because all passenger cars sold in this country must comply with Standard 208, Florida motorists using factory installed seat belts can be assured that they are in compliance with the law.

179. *Weber*, 494 N.Y.S.2d at 962 (emphasis in original).

180. *Id.*

181. *Id.*

182. *Id.* at 964. The exemptions for taxis and liveries—which are not found in the FSBL—troubled the court. However, the court concluded that legislators might have ex-

Lastly, the court concluded that

[n]o one has an inherent right to drive a car. Each one of us can drive only with a license, granted on condition that he complies with all reasonable and constitutional statutes for the protection of the public, including himself. The court finds that the New York mandatory safety belt law is such a statute, and that it consequently is constitutional.¹⁸³

The second New York decision regarding that state's seat belt law is *Wells v. State*.¹⁸⁴ Wells sought a declaratory judgment that the New York statute was unconstitutional, advancing arguments similar to those made by Weber¹⁸⁵ but also claiming that "the law 'depriv[ed] [him] of his right to make an intelligent decision which pertain[ed] solely to his person and his personal safety.'"¹⁸⁶ Wells' attempt to rest this right to privacy upon *Roe v. Wade*¹⁸⁷ proved unsuccessful. Flatly rejecting the argument, the court stated: "One's right to control one's own body, and the government's attempt to interfere with what takes place inside that body, can hardly be compared with the State's interference with the liberty of the individual inside his or her automobile."¹⁸⁸

The survival of New York's statute is instructive, but not definitive. Judicial affirmance of Florida law analogous to the FSBL suggests that Florida courts, like New York's, will be supportive of the new seat belt law. An analogous Florida law is section 316.211, Florida Statutes,¹⁸⁹ which requires motorcyclists to wear securely fastened protective headgear. The constitutional issues raised by mandatory motorcycle helmet legislation are nearly identical to those posed by the seat belt law, and the Florida Supreme Court unanimously upheld the helmet law in *State v. Eitel*.¹⁹⁰

In *Eitel*, the court announced the purpose of the helmet law to be the preservation of life and the health of a cyclist,¹⁹¹ an interest

empted these vehicles believing their drivers, if restrained, would be more vulnerable to armed robbery. *Id.*

183. *Id.*

184. 495 N.Y.S.2d 591 (N.Y. Sup. Ct. 1985).

185. *Id.* at 592.

186. *Id.* at 594.

187. 410 U.S. 113 (1973).

188. *Wells*, 495 N.Y.S.2d at 595.

189. FLA. STAT. § 316.211 (1985).

190. 227 So. 2d 489 (Fla. 1969).

191. *Id.* at 490.

it declared was deeply rooted in organized society.¹⁹² Moreover, it found the requirement to wear a helmet a minor inconvenience that the legislature may impose, considering the protection a helmet provides against death or serious injury.¹⁹³ As for the right of the individual to be left alone, the court was similarly direct: "If [the cyclist] falls, we cannot leave him lying in the road. The legislature may constitutionally conclude that the cyclist's right to be let alone is no more precious than the corresponding right of ambulance drivers, nurses, and neurosurgeons."¹⁹⁴

Surely the same can be said about a motorist's "right" to ride unrestrained. Moreover, it is difficult to imagine that a court which has recently recognized that merely minimal effort is required to fasten an available safety device—and has further asserted that the seat belt is a proven way to minimize injuries before an accident—would find the seat belt law unconstitutionally intrusive.¹⁹⁵ The FSBL imposes upon Florida motorists no more onerous a duty than does the *Pasakarnis* decision; the legislature struggled to curtail the statute's intrusiveness.

One development in Florida law since *Eitel* offers the basis for a rejuvenated—though probably unsuccessful—right-to-privacy argument. In 1980, Florida voters approved the addition of a privacy provision to the Florida Constitution, guaranteeing every citizen the "right to be let alone" by the state.¹⁹⁶ Although this right to privacy is much broader than the piecemeal privacy guarantee recognized under the United States Constitution,¹⁹⁷ the supreme court has held that it does not provide an absolute barrier against state intrusion into one's private life.¹⁹⁸ The privacy right must be assessed in the context in which it is asserted.¹⁹⁹ Nevertheless, the supreme court has held that it will apply its most searching scrutiny—the compelling state interest test²⁰⁰—when reviewing alleged

192. *Id.* at 491.

193. *Id.*

194. *Id.*

195. *Pasakarnis*, 451 So. 2d at 453.

196. FLA. CONST., art. I, § 23.

197. *Winfield v. Division of Pari-Mutuel Wagering*, Dep't of Bus. Reg., 477 So. 2d 544, 548 (Fla. 1985).

198. *Florida Bd. of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983).

199. *Id.* For example, because the practice of law is a privilege rather than a constitutional right in Florida, an applicant to the Florida Bar must disclose his entire history of medical and psychological treatment. *Id.*

200. *Winfield*, 477 So. 2d at 547. In theory, this test shifts the burden of proof to the state to demonstrate that the governmental intrusion serves a compelling state interest, and does so through the least intrusive means. *Id.*

governmental intrusion. However, there must exist a reasonable expectation of privacy before the strict scrutiny standard will be used.²⁰¹

Assuming that the decision to wear a seat belt falls within the sphere of personal autonomy,²⁰² the state probably could demonstrate that the new seat belt law serves several compelling state interests, namely, saving lives, preventing serious injuries, and easing the financial burden that the state often incurs in the care of injured individuals. Whether the seat belt law is the least intrusive means of serving this interest is problematic, but it is doubtful that the courts would second-guess the legislature on this question. More likely, courts will avoid reaching the question by simply refusing to ascribe a right of privacy to the use of seat belts. In any event, Florida motorists should resign themselves to the all but inevitable: the Constitution's sharp sword probably will not strike down the seat belt law.

VII. CONCLUSION

By passing the FSBL the legislature has tried to protect Florida's motorists. But by doing so has it embarked upon the slippery slope of paternalism, treading blithely on individual liberty?

One senator suggested that a substantial number of lives could be saved by outlawing cigarettes and alcohol.²⁰³ He also proposed mandating shower harnesses to prevent bathtub falls.²⁰⁴ The FSBL is not so oppressive. The relatively inconsequential penalty, coupled with the stipulation that the law be enforced only in conjunction with some other wrong, permits Florida motorists to flout the FSBL with near impunity.

But in appeasing the critics, did the legislature so tame the bill as to render it impotent? Perhaps the FSBL's strength lies not in its limited capacity to penalize but in its substantial potential to serve as a gentle reminder to buckle up. Whether it be regarded as legislative mollicoddling²⁰⁵ or good government, there is every indication that the FSBL will result in greater seat belt use in Florida. In New York, restraint use increased from 16% to 69% after

201. *Id.*

202. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153-53 (1973) (recognizing protected privacy interest for decisions on procreation).

203. S. Comm. Tape, *supra* note 74 (remarks of Sen. Langley).

204. FLA. S. JOUR. 422 (Reg. Sess. May 28, 1986) (amendment 1 to CS for HB 40).

205. Sen. Dempsey J. Barron, Dem., Panama City, coined the term "milk-feeding" to describe the bill's paternalistic approach. May 28 Senate Debate, *supra* note 5.

the seat belt statute went into effect; about 57% of residents continue to comply with the law.²⁰⁶

If the FSBL is obeyed it may save lives, prevent injuries, and reduce automobile insurance costs. According to Insurance Commissioner Bill Gunter:

If Florida had had [this] law in 1984, and just fifty percent of our people had complied with it, we would have finished that year 431 lives richer; we would have prevented 6,657 expensive and painful human injuries; and we would have saved more than twelve million in real dollars which were spent patching these victims back together²⁰⁷

If Commissioner Gunter is correct and the FSBL succeeds in prodding Floridians to buckle up, the future may see this litany of loss become a celebration of savings.

206. *Wells v. State*, 495 N.Y.S.2d 581, 596 (N.Y. Sup. Ct. 1985).

207. S. Comm. Tape, *supra* note 74.

